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7 **UNITED STATES DISTRICT COURT**  
8 **DISTRICT OF NEVADA**  
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10 UNITED STATES OF AMERICA

11 Plaintiff,

12 v.

13 UNITED STATES CURRENCY AND  
14 CURRENCY EQUIVALENT IN THE  
15 NAME OF OR CONTROLLED BY  
HERBERT JACOBI AS FURTHER  
DESCRIBED IN EXHIBIT A.

16 Defendants.

Case No. 2:01-cv-01450-KJD(PAL)

**ORDER**

17 AND RELATED THIRD PARTY ACTIONS

18 Presently, before the Court is Claimant/Third Party Defendant Herbert Jacobi's  
19 Motion to Dismiss (#188). Third Party Claimants, Richard W. Stanczyk and Terry C. De  
20 Muth, filed a Response (#189), to which Claimant Jacobi filed a Reply (#190). For the  
21 reasons stated *infra*, the motion will be denied.

22 I. Procedural History

23 On April 26, 2006, Claimants Stanczyk and De Muth filed a Motion for Leave to File  
24 a Third Party Complaint. On August 11, 2006, after considering the opposition to that  
25 motion, the Court ordered (#172) that Claimants could file their proposed Third Party  
26 Complaint.

1           II. Claimant Jacobi's Contentions

2           Claimant/Third Party Defendant Jacobi contends that the Third Party Complaint  
3 should be dismissed on grounds that it fails to state any claim against the defendant property  
4 upon which relief may be granted, fails to state any claim against Claimant/Third Party  
5 Defendant Jacobi (Movant) upon which relief may be granted, fails to allege a claim of fraud  
6 or conversion, and is barred by the applicable statutes of limitations.

7           III. Analysis

8           A. Statement of Claim against Defendant Property and Claimant Jacobi

9           In considering a motion to dismiss, "all well-pleaded allegations of material fact are  
10 taken as true and construed in a light most favorable to the non-moving party." Wylar  
11 Summit Partnership v. Turner Broadcasting System, Inc., 135 F.3d 658, 661 (9th Cir. 1998)  
12 (citation omitted). However, a court does not necessarily assume the truth of legal  
13 conclusions merely because they are cast in the form of factual allegations in a plaintiff's  
14 complaint. See Clegg v. Cult Awareness Network, 18 F.3d 752, 754-55 (9th Cir. 1994).  
15 There is a strong presumption against dismissing an action for failure to state a claim. See  
16 Gilligan v. Jamco Dev. Corp., 108 F.3d 246, 249 (9th Cir. 1997) (citation omitted).  
17 The issue is not whether plaintiff will ultimately prevail, but whether he may offer  
18 evidence in support of his claims. See id. at 249 (quoting Scheuer v. Rhodes, 416 U.S. 232,  
19 236 (1974)). Consequently, the court may not grant a motion to dismiss for failure to state a  
20 claim "unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of  
21 his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957);  
22 see also, Hicks v. Small, 69 F.3d 967, 969 (9th Cir. 1995). A claim is sufficient if it shows  
23 that the plaintiff is entitled to any relief which the court can grant, even if the complaint  
24 asserts the wrong legal theory or asks for improper relief. See United States v. Howell, 318  
25 F.2d 162, 166 (9th Cir. 1963).

1 Federal Rule of Civil Procedure 14(a) provides for service of a third party complaint  
2 “upon a person not a party to the action who is or may be liable to [the original defendant] for  
3 all or part of the plaintiff’s claim”. Movant contends that because the seizure action was filed  
4 against the currency, and not against an individual or entity, that third party plaintiffs cannot  
5 bring third party claims against the third party defendants. While this argument appears to  
6 make sense under the plain language of Rule 14, it is contrary to the policies underlying Rule  
7 14 and has been rejected by courts that have permitted third party complaints by claimants in  
8 forfeiture proceedings. The decision to permit third party defendants to be impleaded is  
9 “entrusted to the sound discretion” of the trial court. Laffey v. Northwest Airlines, Inc. 567  
10 F.2d 429 477 (D.C. Cir. 1976).

11 To the extent Movant is suggesting that third party claims cannot be resolved  
12 in the context of a forfeiture proceeding, he is incorrect. See, e.g., United States v. One 1977  
13 Mercedes Benz, 708 F.2d 444, 452 (9th Cir. 1983)(holding that a third party claim may be  
14 asserted when the third party’s liability is in some way dependant on the outcome of the main  
15 claim and the third party’s liability is secondary or derivative).<sup>1</sup>

16 Here, the Third Party Complaint adequately alleges that Third Party Defendant Jacobi  
17 may be liable for all or part of Third Party Plaintiffs’ claims. Third Party Plaintiffs also  
18 allege that the currency seized from Jacobi is proceeds from illegal actions taken by Jacobi  
19 and others that have affected the ownership and value of stock in AimRite. Plaintiffs’ third  
20 party claims against Defendant Jacobi are derivative of the original forfeiture claim and  
21 dependant on the outcome of that claim. Accordingly, the Third Party Complaint is adequate  
22 for purposes of stating a claim upon which relief may be granted.

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25 <sup>1</sup>It should be noted that Movant, Jacoby, himself has, in connection with his answer and claim  
26 filed in this action, asserted a third party complaint against Robert Potter. (#16)

1        B. Pleading Fraud and Conversion

2        Rule 9(b) of the Federal Rules of Civil Procedure requires that in all averments of  
3 fraud, the circumstances constituting fraud shall be stated with particularity. The Third Party  
4 Complaint sets forth the entire fraudulent scheme undertaken by Third Party Defendant  
5 Jacobi, including the conversion of AimRite stock or the value of the stock belonging to  
6 Third Party Plaintiffs. Specifically, the Third Party Complaint asserts that Third Party  
7 Defendant Jacobi participated in a scheme in which false representations of “free trading”  
8 stock (obviously part of a “pump and dump” stock fraud scheme) were made. Movant’s  
9 claim, that this is insufficient to allege a false representation, is disingenuous.

10       C. Limitation of Actions

11       The Court has already addressed the matter of timeliness of the Stanczyk and De  
12 Muth claims (#172). For actions based on fraud and conversion, the period of limitations  
13 runs from the discovery of the fraud or conversion. As set forth in their motion for leave to  
14 file third party complaint, Third Party Plaintiffs were not aware of Third Party Defendant  
15 Jacobi’s fraud until they filed their motion in April of 2006. This allegation is sufficient to  
16 survive the instant motion to dismiss.

17       IV. Conclusion

18       Accordingly, IT IS HEREBY ORDERED that Claimant/Third Party Defendant  
19 Jacobi’s Motion to Dismiss (#188) is DENIED.

20       DATED this 28<sup>th</sup> day of September 2007.

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24       Kent J. Dawson  
25       United States District Judge  
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